IN THE SUPREME COURT OF BELIZE, A.D. 2009

CLAIM NO. 155 OF 2009

SAID MUSA **Applicant**

BETWEEN **AND**

EARL JONES
MAGISTRATE FOR THE BELMOPAN
COURT IN THE
CAYO JUDICIAL DISTRICT **Defendant**

—

BEFORE the Honourable Abdulai Conteh, Chief Justice.

Mr. Edwin Flowers S.C. with Ms. Lisa Shoman, Mr. Anthony Sylvestre, Mr. Kareem Musa and Mr. Kevin Arthurs for the claimant.
Ms. Cheryl-Lynn Branker-Taitt, Acting Director of Public Prosecutions, for the defendant.

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JUDGMENT

The claimant in these proceedings, Mr. Said Musa, was, until 7th February 2008, the Prime Minister and Minister of Finance of Belize. He lost these positions when his political party lost the General Elections held in the country on 7th February 2008. Mr. Musa, however, successfully defended his seat and is currently a member of the House of Representatives in the National Assembly

of Belize. He is by profession an attorney-at-law of the rank of Senior Counsel.

2. Not too long after Mr. Musa's party lost the General Elections, he was on 4th December 2008, charged with having on the 28th December 2007, committed the offence of theft of US $10 million dollars (ten million United States dollars). The actual charge laid against him reads as follows:

> ***"For that SAID MUSA, on 28th day of December 2007, in the City of Belmopan, in the Cayo Judicial District, stole the sum of US $10,000,000.00, the property of the Government of Belize."***

3. On the same 4th December 2008, the claimant was taken before a Magistrate of the Belmopan Magistrate Court, who ordered that disclosure of the prosecution's evidence be made to the claimant's lawyers on or by 18th December 2008. That Magistrate then set the 9th January as the date for the preliminary inquiry into the charge.

4. The defendant in these proceedings before me is the magistrate who in fact later conducted the preliminary inquiry into the offence with which the claimant was charged. But this was after he had deposed Ms. Amalia Mai on 31st December 2008. The preliminary inquiry was conducted by the defendant on 29th January 2009 and he gave his decision on 10th February 2009. These proceedings have resulted from the order of committal for trial in the Supreme Court on the charge of theft that he made against the claimant on 10th February 2009. This Order was contained in a written decision

the defendant handed down on that day. The decision and the committal order came after the defendant had conducted a preliminary inquiry into the charge involving the claimant.

5. Shortly after the claimant had been charged, Mr. Ralph Fonseca, a former Minister of Housing and Home Affairs in the claimant's government was also charged with the same offence of theft of US $10 million dollars, the property of the Government of Belize. He was also brought before the same magistrate, the defendant, but on different days. However, Mr. Fonseca, was on 3rd March 2009, following a preliminary inquiry by the defendant, discharged for lack of sufficient evidence: see the second affidavit of the claimant filed in these proceedings on 5th March 2009.

The Background to the charge of theft against the claimant and Mr. Fonseca

6. The charge of theft preferred first against the claimant and later against Mr. Fonseca as well, arose out of the grant of US $20 million dollars by the State of Venezuela to the Government of Belize in 2007, pursuant to a bilateral cooperation agreement between the two countries.

7. On 23rd December, 2007, Mr. Musa the claimant, in his capacity as Prime Minister, in a letter from the Office of the Prime Minister of Belize, wrote to Sr., Rafael E. Isea, the Vice Minister of Finance of Venezuela regarding the disposal of this grant of US $20 million dollars. In this letter, the claimant stated that he had been asked to communicate directly with Mr. Isea regarding the execution of the cooperation agreement which had been approved by the President of Venezuela. He also stated that approval had been received for

US $10 million dollars to repay ***"our government's bank obligations and US $1 million dollars toward counterpart funds for a Stadium being built … and US $9 million dollars for ongoing works as a non repayable grant."*** The claimant further wrote in this letter that:

> ***"We are asking that US $10 million dollars of these funds be transferred to the Bank of America … account of (the) Belize Bank … The other US $10 million dollars should be transferred to the Federal Reserve Bank of New York … (for) the Central Bank of Belize's account."***

8. In this letter, the claimant further stated that he was "authorizing Belize's then ***"Vice Minister of Foreign Affairs Amb. Amalia Mai … to sign all necessary documentation in*** (Mr. Isea's) ***office in Caracas as soon as possible."*** The claimant further stated that "It is crucial that our obligations and accounts show these transactions as completed for the year end." He ended this letter of 23rd December 2007, with appreciation for any assistance that could be afforded to ***"Amb. Mai to expedite these matters."***

9. On 24th December 2007, the claimant, on the official letterhead of the Prime Minister, issued "Authority to Sign" to ***"Ambassador Amalia Mai the Chief Executive Officer in the Ministry of Foreign Affairs … to sign for and on behalf of the***

Government of Belize, a Grant Agreement and all other related documents between the Bolivarian Republic of Venezuela and the Government of Belize for the provision of Grant Funding to Belize for the financing of the Government of Belize's Poverty Alleviation Programs."

10. Ms. Amalia Mai proceeded in due course to Caracas, Venezuela on 27th December 2007 and on 28th December 2007 there concluded the formal agreement relating to the Venezuelan grant of US $20 million dollars to Belize. The Agreement itself was executed between the Bank of Economic and Social Development of Venezuela (Administrator of the Autonomous Fund for International Cooperation) BANDES **and** the Government of Belize (for Programmes for the Construction and Repair of Houses for Low Income Persons). The Agreement was signed respectively by Mr. Rafael Isea Romero for BANDES and Amalia Mai for the Government of Belize.

11. Mr. Rafael Isea Romero, was it should be noted, evidently the same gentleman, the claimant had written to on 23rd December 2007 about the Venezuelan grant and its disposal, albeit, in his capacity as Vice Minister of Finance of Venezuela.

12. On 7th February 2008, the claimant's administration as I have said, lost the General Elections held on that day and a new administration was ushered into office. Sometime later towards the end of 2008, the claimant was charged on 4th December, 2008, with the offence of theft of US $10 million dollars, the property of the Government of Belize.

13. However, some weeks after the General Elections, the claimant, together with Mr. Ralph Fonseca, sought and were given audience by the new Prime Minister. The Prime Minister was later to make a statement on 5th November 2008, detailing the substance and drift of the audience he had with the claimant and Mr. Fonseca. This statement, together with that of Ms. Audrey Wallace, the Chief Executive Officer in the Prime Minister's office made on 10th November 2008, were put in evidence before the defendant at the preliminary inquiry into the offence of theft against the claimant. Ms. Wallace was present when the Prime Minister had audience with the claimant and Mr. Fonseca.

14. However, the statement to the nation concerning the Venezuelan grant, which the claimant had said to the Prime Minister he would make, was not, for some reason, put before the defendant. The claimant had in fact made a nationwide broadcast on 5th March 2008, the same day as the audience which the Prime Minister had with him and Mr. Fonseca. (More on this statement later in this judgment).

15. On 31st December 2008, Ms. Amalia Mai appeared before the defendant and made a statement/deposition. However, the circumstances in which Ms. Mai appeared before the defendant and the contents of her statement have loomed large in these proceedings before me. (I shall say more on this later).

16. The upshot of all of this was that the claimant was charged with the offence of theft of the US $10 million dollars, a part of the Venezuelan grant; as was Mr. Fonseca later. It should be noted that the claimant was charged with the offence of theft of US $10 million dollars on 4th December 2008. He was eventually brought

before the defendant who conducted the preliminary inquiry on 29th January 2009. This was some four weeks **after** Ms. Mai had been deposed before the defendant.

17. On the 29th January 2009, a preliminary inquiry was subsequently held by the defendant into the offence of theft by the claimant. At this preliminary inquiry, the lead attorney for the claimant made a no-case submission to which the learned Director of Public Prosecutions replied. On the 10th February 2009, the defendant made the order committing the claimant in a decision he delivered in writing.

18. It is clear therefore that the preliminary inquiry involving the claimant was done pursuant to section 34 of the Indictable Procedure Act – Chapter 95 of the Laws of Belize, Rev. Ed. 2000. I need, perhaps to set matters in context, say a word or two about Preliminary Inquiry/Committal Proceedings in Belize.

Preliminary Inquiry/Committal Proceedings in Belize

19. Up until 1998, there was only one form of committal proceedings or preliminary inquiry into indictable offences available in Belize. This was what has been fairly described as the "long form" of committal proceedings. This was provided for in sections 32 to 40 of the then unamended Indictable Procedure Act (Chapter 93 of the Laws of Belize, Revised Edition 1990). This then provided in section 35 for the taking of **evidence for the defence**.

20. However, in 1998, by the Law Reform (Miscellaneous Provisions) Act - Act No. 18 of 1998, certain changes were effected by amendments to the Indictable Procedure Act, now contained in

sections 32 to 44 of the Indictable Procedure Act – Chapter 96 of the Laws of Belize, Revised Edition 2000 (the "Act" henceforth).

21. As a result of these modifications in committal proceedings, there is available today in Belize, two forms of committal proceedings: First, **Committal for trial without consideration of the evidence**. This is provided for in section 33 of the Act. In this case an examining magistrate shall, if satisfied that all the evidence for the prosecution is in the form of written statements, copies of which have been given to the accused at least fourteen days before the inquiry, commit the accused for trial for the offence or offences with which he is charged, without consideration of the contents of those statements – see section 33(1) of the Indictable Procedure Act. Therefore, under this provision, an examining magistrate can commit the accused for trial without even considering or reading the contents of the written statements. If the examining magistrate decides to commit the accused for trial under section 33 he shall do the following*: i) give the accused person the warning as to alibi provided for in section 44 of the Act; ii) append the following certificate to the committal bundle: "committed for trial without consideration of the evidence pursuant to section 33 of the Indictable Procedure Act"; iii) commit the accused for trial at the next practicable sitting of the Supreme Court in the District in which the committal proceedings are held* and iv) *make all ancillary and consequential orders regarding the attendance of the accused and the witnesses at trial.*

It is to be noted that the hallmark of this form of committal proceedings is that there is no requirement for the examining

magistrate to consider or even read the papers before: he simply commits the accused without any hearing hence the appellation "paper committal".

22. The second form of committal proceedings is provided for in section 34 of the Act. This is **committal after hearing submissions on the evidence**. This is available where the examining magistrate has ascertained that the accused or his legal representative wishes the court to consider a submission that there is insufficient evidence to put the accused on trial for the offence or offences with which he is charged. In this case, the examining magistrate shall permit the prosecutor, if he so wishes, to make an opening address to the court before any evidence is tendered.

23. An anomalous feature, if I may say so, in this case before me is that as I have noted above, the defendant who had deposed Mr. Amalia Mai on 31st December 2008, was again to conduct the preliminary inquiry regarding the claimant on 29th January, 2009. I shall comment on this feature of this case later.

24. After the opening address if any, the examining magistrate then causes evidence to be tendered in accordance with sections 35, 36, 37, 38, 39, 40, 41 and 42 of the Act, depending on which is applicable. However, the evidence tendered by the prosecution shall be in the form of documentary evidence only and it shall not be necessary to call any witnesses, and if any are called, they shall not be cross-examined. The examining magistrate may review any exhibits produced before the court and make take possession of them. And after the evidence has been tendered by the prosecutor, the examining magistrate shall hear any submission the accused may wish to make as to whether there is sufficient evidence to put

him on trial for any indictable offence. But the accused is not entitled to give any evidence on his own behalf at the inquiry or call any witnesses. The prosecutor is however entitled to make a submission in reply to any submission made by the accused.

25. Crucially, after hearing submissions from both sides, the examining magistrate shall either:

> ***a) commit the accused for trial at the next practicable session of the Supreme Court for the District in which the inquiry is held; if he is of the opinion that there is sufficient evidence to put the accused on trial for the offence or offences with which he is charged or for any other indictable offence which is disclosed in the evidence tendered to the court***, or
>
> ***b) discharge the accused if the examining magistrate is not of the opinion that there is sufficient evidence to put the accused on trial.***

26. It is to be noted, and the point cannot be over-emphasized, that in the second stream of committal proceedings which is provided for in section 34 of the Act, the focus and determinative criterion is **sufficiency of evidence**. First, the accused is given the right under subsection (5) to make submission as to **whether there is any sufficient evidence** to put him on trial for any indictable

offence; and secondly, the examining magistrate can only commit the accused after hearing from both sides, if he is of the opinion that **there is sufficient evidence** to put the accused on trial for the offence or offences with which he is charged or for any other indictable offence which is disclosed in the evidence tendered to the Court. It was this stream of committal proceedings that was used at the preliminary inquiry involving the claimant, that is, a section 34 committal.

27. This second stream of committal proceedings is in stark contrast with the first stream under section 33 of the Act. Under this section the examining magistrate only has to satisfy himself that all the evidence for the prosecution is in the form of written statements, copies of which have been given to the accused at least fourteen days before the date of the trial, then he may commit the accused for trial for the offence or offences with which he is charged. There is here under section 33 no duty on the examining magistrate to consider the contents of those statements or even, it would seem, to read them. The presence or sufficiency of evidence is immaterial under section 33. The examining magistrate can commit the accused for trial but only for the offence or offences with which he is charged. Hence the appellation "paper committal". But it is committal nonetheless. But, unlike paper committal, the accused in a committal after consideration of a submission on the sufficiency of evidence or otherwise, may be committed for trial on the offence with which he is charged **or** any other offence which is disclosed in the evidence tendered to the court, if the examining magistrate is of that opinion.

28. The claimant, as I have said, was committed pursuant to section 34 of the Act after extensive submissions by his attorney Mr. Edwin

Flowers SC and the learned acting Director of Public Prosecutions. There was therefore, in my view, a clear duty on the examining magistrate, the defendant, to satisfy himself that there was sufficient evidence to put the claimant on trial for the offence of theft with which he was charged or any other indictable offence disclosed by the evidence tendered to the court.

29. In these proceedings before me, the claimant has launched a number of challenges by way of judicial review against his committal by the defendant to stand trial on the charge of theft.

Preliminary Inquiry/Committal Proceedings and Judicial Review

30. It is perhaps necessary, if only for the avoidance of doubt, to say a few words about committal proceedings or preliminary inquiry and the availability of judicial review of the outcome of such proceedings.

31. It is now established that a preliminary inquiry is part and parcel of the trial of an indictable offence: as Peterkin JA observed in **Halstead v Commissioner of Police (1978) 25 WIR, 522** at p. 524:

> ***"… a preliminary inquiry (is) part and parcel of the trial of an indictable offence. It may well and quite often does result in the discharge of the person accused."***

The Privy Council recently in **Hilroy Humphreys v The Attorney General of Antigua and Barbuda**, in its decision delivered on 11th December 2008, is of the view that the basic premise that a

preliminary inquiry be conducted fairly though uncontroversial, is not however offended by not having a preliminary inquiry, In **Humphreys'** case, the Legislature had abolished preliminary inquiry.

32. But in Belize as I have tried to show above at paras. 19 to 28, a preliminary inquiry into indictable offences is still extant and well, although in a somewhat attenuated form than pre-1998, but the process is still available.

33. However, where one is held, especially the non-paper committal of an accused under section 34 of the Act, as in the instant case involving the claimant, it is in my view imperative that the uncontroversial requirement of fairness in its conduct be observed: it must be conducted fairly.

34. It should be remembered that the core purpose of a non-paper preliminary inquiry is to act as a filter so as to ensure that only viable cases proceed eventually to trial. The process itself is, of course, not fool-proof. For even after committal, a jury might well at trial conclude that the accused is not guilty; and he may thereby be discharged and should not have been put on trial. But the process does ensure that time and resources are not wasted and that no one need to go through the agony, anxiety, suspense and costs of a criminal trial only to be discharged eventually. The process itself is a creature of statute and its statutory provisions and proper conduct must be scrupulously observed.

35. However, for good judicial policy and the proper conduct of the criminal justice system, judicial review is not easily and readily available against every and any committal proceedings. In this

connection I respectfully adopted the statement of Lord Mustil in the English House of Lords in **Neil v North Antrim Magistrates' Court and Another (1992) 1 WLR 1220** when he stated at p. 1231:

> ***"I wholly share the sentiments of those who, over the years, have exclaimed in dismay at the vision of the streams of applications by persons committed for trial seeking to put off the evil day by drawing attention to the supposed errors in the application at the committal stage of the highly technical rules of criminal evidence. It is only in the case of a really substantial error leading to a demonstrable injustice that the judge … should contemplate the granting of leave to move."*** (Emphasis added)

I must say I was guided by these considerations when I granted leave on the 11th March for the claimant to move to review the defendant's order in these proceedings.

36. This salutary caution is always to be borne in mind in considering applications for the grant of permission to challenge a committal order by an examining magistrate by way of judicial review. This coupled with the fact that in judicial review proceedings the grant of any remedy is discretionary, may explain perhaps, the infrequency of challenges to committal orders by way of judicial review, and I do not encourage it.

37. In the instant case before me, however, the application by the claimant for permission to seek judicial review of his committal by

the defendant was heard by me on 11th February 2009. After Mr. Flowers S.C. the applicant's lead attorney had moved the application, the learned counsel representing the defendant (as the hearing was inter-partes) sought a short adjournment which was granted. The attorneys for both sides later approached me in chambers to indicate that there would be no opposition from the learned Director of Public Prosecutions to the application for permission. This was later confirmed by the learned attorney representing the Director of Public Prosecutions. I accordingly granted permission for the claimant to seek judicial review of the committal order made by the defendant and stated in writing my reasons for doing so. The absence of any objection by the Director of Public Prosecutions was perhaps attributable to the Court's indication that it was minded to proceed with the application for permission on that day.

38. However, the caution surrounding committal proceedings and their challenge by way of judicial review notwithstanding, it is the case that the remedy in an appropriate case, is available. Indeed, as Lord Mustil stated in the **Neil case** supra at p. 1230:

> ***"That committal proceedings are in principle susceptible to judicial review is beyond doubt, and the fact that certiorari will lie in cases of procedural irregularity in such proceedings is I believe also quite clear. For recent statements on this I would refer to Reg v Colchester Stipendiary Magistrate, Ex parte Beck [1979] QB 674 and especially per Robert Goff J, at p. 688 D; Reg v Horseferry Road Stipendiary***

Magistrates, Ex parte Adam [1977] 1 WLR 1197; Reg v Coleshill Justices, Ex parte Davies [1971] 1 WLR 1684; Reg v Highbury Magistrates' Court, Ex parte Boyce (1984) 79 Cr. App. R 132 … The question is, however, whether the reception of inadmissible evidence will found this remedy. As with many problems of judicial review, this question does not admit of an outright answer. Everything depends on the circumstances."

39. Moreover, in a later House of Lords decision in **Regina v Bedwelty Justices, ex parte Williams (1997) AC 225**; **(1996) 3 WLR 361**, it was held that:

"(A) committal for trial by jury at the Crown Court was liable to be quashed in judicial review proceedings where there had been a procedural error by the justices in performing their functions under section 6(2) of the Magistrates' Courts Act 1980; that although certiorari was at the discretion of the court, it would normally follow where there had been no admissible evidence before the justices of the defendant's guilt or where the committal had been so influenced by inadmissible evidence as to amount to an irregularity having substantial adverse consequences for the defendant, whereas the court would be slow to interfere on

a complaint that evidence had been admissible but insufficient, which was more appropriately dealt with at trial; that the service of formal witness statements subsequent to a committal based on inadmissible evidence did not remedy the defect since there was no opportunity to cross-examine the maker of the statements before trial." (Emphasis added)

40. I find this **ratio** in **Bedwelty supra** instructive in the instant case before me given the question that was certified by the Divisional Court for resolution by the House of Lords as a point of law of general public importance, namely:

"1. Whether it is open to a Divisional Court of the Queen's Bench Division by order of certiorari to quash a committal for trial under section 6(1) of the Magistrates' Court Act 1980 where there was (a) misreception of inadmissible hearsay evidence by the magistrates and (b) no other evidence capable of being deemed sufficient to put the accused on trial by jury. 2. If so, on what principles should the discretion to order certiorari be exercised?" (Emphasis added).

41. In delivering the judgment of the House of Lords, Lord Cooke of Thorndon (with whom the other Law Lords Lord Keith of Kenkel, Lord Goff of Chieveley, Lord Jauncey of Tullichettle and Lord Brown-Wilkinson agreed) referred at p. 366, to the unreported judgment of the English Court of Criminal Appeal **in Reg v Lincoln**

Magistrates' Court, Ex parte Field (unreported 19 July 1993) where Watkins LJ observed:

> ***"Before I say what I think must be said about the quality of the evidence which came before the justices, I should say that it must be clearly recognized by anyone who seeks to move this court in respect of a decision by justices to commit for trial, that an application of that kind can only succeed where there has clearly been an error or law, an error of law including, for example, where there has been a committal by justices in circumstances where it can properly be said there was simply no evidence upon which they could exercise their power to commit a defendant for trial."*** (Emphasis added).

42. Further, in **Bedwelty** at p. 367, Lord Cooke continued:

> ***"To convict or commit for trial without any admissible evidence of guilt is to fall into an error of law. As to the availability of certiorari to quash a committal for such an error, I understand at the end of the arguments that all your Lordships were satisfied that in principle the remedy is available and that the only issue presenting any difficulty relates to the exercise of the Court's discretion. This conclusion about***

principle reflects the position now reached in the development of the modern law of judicial review in England through a sequence of cases beginning with Rex v Northumberland Compensation Appeal Tribunal, Ex parte Shaw (1952) 1 KB 338 and extending by way most notably of Anisminic Ltd v Foreign Compensation Commission (1969) 2 AC 147 to (at present) Reg v Hull University Visitor, Ex parte Page (1993) AC 682. The path of the authorities is traced in such leading textbooks as Wade and Forsyth, Administrative Law … and de Smith, Woolf and Jowell, Judicial Review of Administrative Action 5th Ed. (1995) pp. 237 – 256." (Emphasis added)

43. I can only add respectfully, that here in Belize, the development of the modern law of judicial review has found fertile soil and I, with respect, endorse the principle propounded by Lord Cooke, that the remedy of certiorari is available in appropriate cases against a committal order of an examining magistrate. I am fortified in this conclusion by the consideration of the fact that the provisions relating to preliminary inquiries introduced in 1998 to the Indictable Procedure Act are linear descendants of the provisions of sections 6(1) and 6(2) of the English Magistrates' Courts Act 1980. So it was throughout the region most regions adopted the provisions introduced into the 1998 Magistrate's Act in England. In fact in Trinidad the former Chief Justice had to strike the amendments down for incompatibility with the constitution. That is not an issue

before me. And the power of an examining magistrate to commit pursuant to section 34 is statutory with certain requirements.

44. I might add here, if only as an ironical footnote, that the claimant himself in his professional reincarnation as an attorney had successfully taken objection to an irregularity in a preliminary inquiry in 1973. He probably has forgotten all about that, and got the Supreme Court to quash an indictment based on that irregular committal: see **R v Banos**, **3 BLR 386**. But this, I must say, was in the halcyon days when an accused was entitled to be asked by the examining magistrate if he wishes to give evidence and the whole of the evidence included evidence for the accused. The examining magistrate in that case failed to do that and the claimant, as I said in his professional capacity, successfully took it up and Staine J who was the presiding judge struck down the indictment founded on that committal.

Contentions urged on behalf of the claimant

45. But it is against the backdrop I have given and the statutory provisions of the Indictable Procedure Act governing preliminary inquiries that the arguments and submissions of both the attorneys for the claimant and the learned Director of Public Prosecutions for the defendant magistrate should, I think, be viewed.

46. Several arguments were canvassed on behalf of the claimant as to why the defendant's committal order should be quashed. I trust I do no disservice to the claimant when I summarize the grounds urged on his behalf as follows:

1. **That in committing the claimant, the defendant wrongfully assumed jurisdiction in the light of his finding that the offence of theft with which the claimant was charged was committed abroad.**

2. **That the admissible evidence put before the defendant disclosed no indictable offence, in particular the offence of theft alleged against the claimant.**

3. **In committing the claimant on 10 February 2009, while later on 3rd March, 2009, discharging Ralph Fonseca who was charged with the same offence of theft and against whom the same evidence was proffered, the defendant's committal order against the claimant was unreasonable in the <u>Wednesbury</u> sense and therefore perverse and unsustainable.**

4. **The defendant admitted inadmissible evidence in committing the claimant.**

47. Before I turn to an examination of these issues, for the avoidance of doubt, I should again, as I was at pains to remind both sides during the arguments and hearing of this case, say that my role in these proceedings is not that of a trial judge of the offence alleged against the claimant. My role is principally to see if there is any merit in the arguments and grounds raised by the claimant against the defendant's decision to commit him to stand trial. And, if all or any

of the grounds of complaints, are sustained, I should, as these are judicial review proceedings, grant or refuse a remedy.

i) <u>Was there a wrongful assumption of jurisdiction by the defendant in committing the claimant</u>?

48. Jurisdiction itself is often a troublesome concept. It is susceptible of meaning different things in different contexts. However, for the purposes of indictable proceedings sections 4 and 5 of the Act provide as follows:

> ***"4. The jurisdiction of the court for the purposes of the Code or any other law creating a crime extends to every place within Belize, or within any island or territory over which the Government exercises authority for the time being or within three miles of the coast of Belize, or of any coast of any such island or territory aforesaid.***
>
> ***5. When an act, which if wholly done within the jurisdiction of the court would be a crime against the Code or other law, is done partly within and partly beyond the jurisdiction, every person who within the jurisdiction does, or abets any part of such act, may be tried and punished under the Code or other law, in the same manner as if such act had been done wholly within the jurisdiction."***

49. The claimant complains that notwithstanding the express finding of the defendant that, on the evidence presented by the prosecution, the alleged offence of theft was committed abroad, he nevertheless proceeded to commit the claimant. This, Mr. Flowers SC, for the claimant submitted, was a crucial finding, because under the laws of Belize, an offence which is not committed in Belize is not triable in Belize. Therefore, he submitted, the defendant committed an error of law and acted unlawfully in committing the claimant to stand trial. He relied among other authorities on **Reg v Harden (1963) 1 QB, 8; 46 Cr. App. R. 90** and **John Lawrence Manning (1998) 2 Cr. App. R. 46**. In the first case, the charges against the appellant, related to obtaining money by false pretences from a company in Jersey. The English Court of Appeal (Lord Parker CJ, Ashworth and Widgery JJ) held that there was no jurisdiction to try the appellant on these charges in England.

50. On behalf of the defendant however, the learned Director of Public Prosecutions correctly, I think, submitted that section 5 of the Indictable Procedure Act enables the trial and punishment of a person who has done any part of any act, which if done in Belize, would be a crime under the Criminal Code in circumstances where the crime was committed by acts done partly within and partly outside of Belize. As a proposition of law, I do not think that the claimant or his attorneys would dissent from this proposition propounded by the Director of Public Prosecutions. But like most propositions of law, it is in their application to the particular set or sets of facts that opinions would differ, as they do in this case. The Director of Public Prosecutions however submitted that section 5 was directly applicable to the facts of the claimant's case.

51. But the express conclusion of the defendant himself on the **place** of the commission of the alleged offence as recorded in his decision is as follows:

> ***"From the evidence submitted before this court, it is clear that the offence was committed abroad in which the intended result which is the commission of a criminal offence occurring in Belize. On that point I say that the court does have jurisdiction to deal with the matter."*** (sic) (Emphasis added).

52. This conclusion, I dare say, is not easy to reconcile with the provisions of section 5, which contemplates an action which if done wholly within Belize would be a crime, is partly done within and partly outside of Belize, then anyone who within Belize does, or abets any part of that action, may be tried and punished in the same manner as if that action had been done wholly within Belize. I believe however, that section 5 caters for inchoate criminal actions such as conspiracies, attempts and abetting which often form a prelude or part of a substantive nominate offence. It allows for the trial and punishment of the perpetrators of these actions if done partly in Belize and partly outside of the country.

53. It is perhaps understandable that the defendant came to the conclusion that he did. That is to say, as he found, ***"From the evidence before this Court, it is clear that the offence was committed abroad …;"*** but, in my view, he seriously erred when

he concluded ***"in which the intended result which is the commission of a criminal offence occurring in Belize."*** (sic)

54. The defendant arrived at this erroneous conclusion after, in his own words, "heralding" words that he attributed to Lord Griffiths that ***"crimes of this nature cease to be largely local in origin and effect, but with the changing order of how things are done the court must face the new reality."*** This attribution to Lord Griffiths is supposedly from the case of **Samchai Liangsiriprasert v Government of the United States of America and Another (1991) 92 Cr. App. R. 77**, where at p. 90 what Lord Griffiths actually said was:

> ***"Unfortunately in this century crime has ceased to be largely local in origin and effect. Crime is now established on an international scale and the common law must face this new reality."***

The reference to the "common law" was in the context of the inchoate offences of conspiracies and attempts which were among the several counts of conspiracy to traffic in dangerous drugs contrary to the common law and acts preparatory to trafficking in dangerous drugs which were among the several charges laid against the appellant in that case. That case was concerned with the extradition of the appellant from Hong Kong where he was enticed by agents of the US to go and receive payment in relation to importation of drugs from Thailand to the USA.

55. In the instant case before the defendant, there was only one single charge of theft against the claimant, and against the claimant only.

Therefore, having found that from the evidence submitted before him, ***"it (was) clear that (that) offence was committed abroad"***, it was incumbent upon the defendant to discharge the claimant. There was therefore, in my view, no need for the gratuitous reference or excursus into – in the words of the defendant, ***"in which the intended result which is the commission of a criminal offence occurring in Belize."*** Quite what "criminal offence occurring in Belize" that the defendant meant he did not say, having found from the evidence submitted before him, that it was clear that the offence was committed abroad. The claimant was charged with only the offence of theft in Belize.

56. That the defendant, on this finding, committed the claimant to stand trial for the offence of theft in the Supreme Court, he fell, in my view, into a grave error. I had set out the charge brought against the claimant at para. 2 of this judgment. This expressly states that he ***"on 28th December 2007, in the City of Belmopan, Cayo Judicial District stole the sum of US $10,000,000.00, the property of the Government of Belize."*** Clearly therefore, the defendant having found, according to the evidence, that the offence was committed abroad, could not properly and lawfully have committed the claimant, as he did, to stand trial in the Supreme Court. The offence of theft is provided for in sections 139 – 148 of the Criminal Code. It is clear that these provisions are intended to apply only within the territorial ambit of Belize. Therefore, in law, any theft **abroad**, whether by a Belizean, a resident or a foreigner, cannot be readily or easily susceptible to prosecution in Belize. I give the example that if you went to Maces in New York or even in Miami and stole items therein, you cannot be tried in Belize for the offence of Theft from Maces in Miami Florida. The territorial ambit

for indictable offences is provided in Section 4 of the Indictable Procedure Code, and I repeat it again.

> ***"4. The jurisdiction of the court for the purposes of the Code or any other law creating a crime extends to every place within Belize, or within any island or territory over which the Government exercises authority for the time being or within three miles of the coast of Belize, or of any coast of any such island or territory aforesaid."***

57. The learned Director of Public Prosecutions valiantly tried to put right the error of the defendant by having recourse to section 5. I however, do not find this section applicable particularly in the light of the charge laid against the claimant and the express finding of the defendant as to the place, **abroad**, where he found the offence was committed.

58. That the issue of jurisdiction to try the offence of theft and kindred other offences of fraud and deception has troubled the courts over the years is borne out by the plethora of cases in the law reports on this aspect of the criminal law. The cases are not always easy to reconcile one with the other: see for example, **Tracey v Director of Public Prosecutions (1971) 55 Cr. App. R. 113**; **(1971) A.C. 537**; **Secretary of State for Trade v Markus (1975) 61 Cr. App. R. 58**; **(1976) A.C. 35**; **Beck (1985) 80 Cr. App. R, 355**; **Pentonville Prison Governor, ex p. Khubchandani (1980) 71 Cr. App. R. 241**; **Thompson (1984) 79 Cr. App. R. 191** and **Smith (Wallace-Duncan) (1995) Cr. App R. 1**.

59. I find, however, if I may so say with respect, a helpful review of the authorities and consideration of this question of jurisdiction by the English Court of Appeal in **John Lawrence Manning (1998) 2 Cr. App. R. 461**, where, after some exhaustive analysis of the issue by Buxton LJ, the Court held among other things, that there was no jurisdiction to try the appellant for charges of procuring the execution of valuable securities by deception where the *actus reus* had been committed abroad: that before an offence could be tried by an English Court it was necessary not only that the defendant be physically within the jurisdiction but also that the act needed to complete the actus reus of the offence should also have taken place within the jurisdiction, and that the "last act" or "terminatory" theory rule of jurisdiction had not been replaced by the "comity" theory. Comity was what Lord Diplock used to extend the jurisdiction of the court. It is not denounced in this case but it was said it should not be the guiding principle in the case of jurisdiction. It is the "last act" or "terminatory" rule

60. In the event, in this case before me, concerning as it is with a judicial review of the defendant's committal of the claimant, I do not feel it necessary to delve into the jurisdictional basis to try the claimant for the offence of theft with which he was charged, the defendant having expressly found on the evidence before him, that the offence was committed abroad. He accordingly, I find, fell into grave error in proceeding to commit the claimant for trial in the Supreme Court in the circumstances.

ii) <u>Did the evidence put before the defendant disclose any indictable offence, in particular, the offence of theft with which the claimant was charged</u>?

61. The evidence put before the defendant was all documentary within the provisions of subsection (4) of section 35 of the Act. That is to say, "***anything in which information or any description is recorded.***" Section 35 itself provides for evidence which is admissible at a preliminary inquiry. It provides in terms:

> ***"35(1) Evidence falling within subsection (2), and only that evidence, shall be admissable by a magistrate's court inquiring into an offence as examining magistrate.***
>
> ***(2) Evidence falls within this subsection if it -***
>
> ***(a) is tendered by or on behalf of the prosecutor; and***
>
> ***(b) falls within subsection (3) below.***
>
> ***(3) The following evidence falls within this subsection -***

(a) written statements complying with section 36;

(b) the documents or other exhibits (if any) referred to in such statements;

(c) depositions complying with section 37;

(d) the documents or other exhibits (if any) referred to in such depositions;

(e) statements complying with section 38;

(f) documents falls within section 39.

(4) In this section, "document" means anything in which information of any description is recorded."

62. It is therefore the case that in a committal for trial after consideration of the submissions by both the prosecutor and on behalf of the defendant, as provided in section 34 of the Act, the

only evidence which the examining magistrate must have regard to is that put before him within the provisions of section 35.

63. In this case, the following documents were put as evidence before the defendant as the examining magistrate:

1. Statement of Hon. Dean Barrow dated 5th November, 2008.

2. Statement of Ms. Audrey Wallace dated November 10, 2008.

3. The Record of deposition taken before the defendant on 31st December 2008 pursuant to section 41 of the Indictable Procedure Act. This deposition is signed by Amalia Mai and authenticated with the Stamp of Office and name of the defendant. [Much was made of this deposition by the claimant's attorney during the hearing of this case. It is no doubt the foundation of the challenge on behalf of the claimant that inadmissible evidence was put before the defendant (contention iv)]. This deposition itself was forwarded to Mr. Flowers SC, the claimant's lead attorney under cover of a letter dated 2nd January 2009 from the acting Director of Public Prosecutions, together with Mr. Barrow's and Ms. Wallace's statements in 1) and 2) above. In her letter forwarding Ms. Mai's deposition,

the Director of Public Prosecutions sent as well the following documents which she, that is the Director of Public Prosecutions, referred to as "exhibits":

a) "Authority to sign" under the hand of the Hon. Said Musa, the claimant.

b) Letter dated 23rd December, 2007, to Sr. Rafael E. Isea R, Vice Minister of Finance of Venezuela, under the hand of Said Musa (then) Prime Minister on the letterhead of the Office of the Prime Minister of Belize.

c) Copy and translation of the Agreement between BANDES and the Government of Belize, dated 28th December, 2007.

64. Much as I have said was made of Ms. Mai's deposition and some of the documents she mentioned in it which were made available to the claimant's attorneys and put before the defendant when he conducted the preliminary inquiry. The charge was made that he admitted inadmissible evidence. This is one of the contentions urged on behalf of the claimant to impugn the defendant's decision. It is convenient to deal with it now in considering the evidence put before the defendant.

65. However, the contention that inadmissible evidence was put before the defendant is, of course, a serious charge and if true, would

undoubtedly have the effect of nullifying the claimant's committal. Mr. Flowers SC for the claimant charged that the taking of Ms. Mai's deposition offended section 6 of the Belize Constitution. He however, did not specify the provision or provisions of the section that was offended. All I can say is that section 6 of the Constitution affords equal protection of the law to everyone and it assures anyone charged with a criminal offence due process as this expression is broadly understood. The charge of unconstitutionality would, it seems to me, stem from the differences between the system of committal proceedings available in Belize up until 1998 and that introduced by the post-1998 modifications to the system by Act No. 10 of 1998. I have already at paras. 19 to 26 **supra**, commented on these modifications. Mr. Flowers SC, as I said, did not elaborate on this aspect. The principal difference under the new post-1998 committal system is that an accused does not now have the right to give evidence or cross-examine witnesses for the prosecution, if any are called. The accused can also be committed for trial under section 33 without even a consideration of the evidence or even reading of the statements by the examining magistrate. But the accused still has the right to address the Court on the sufficiency of the evidence and the examining magistrate has a duty under section 34 to consider the evidence before he makes any committal order. This new system has been in existence for a little over a decade now. It may or may not be as fair as the old system was to an accused at the preliminary inquiry stage in which the accused then had the right to call witnesses, give evidence and cross-examine the prosecution's witnesses. But, as their Lordships stated in the Privy Council case in **Humphreys supra**, a case from Antigua and Barbuda where preliminary inquiry was abolished by a new legislation:

> ***"In the Board's opinion it is a mistake to argue that because the old system provided a fair hearing, the change or abolition of some element of that system results in the new system being unfair. The question is not the extent to which the new committal proceedings differ from the old preliminary inquiries but whether the new system of committal proceedings and trial, taken as a whole, satisfies the requirements of section 15(1)"*** (which is ipssima verba the same as section 6(2) of the Constitution of Belize.

66. I do not however understand the claimant to be arguing in these proceedings that the relevant provisions of the Indictable Procedure Act on taking evidence by an examining magistrate as being unconstitutional. Rather, the contention is that Ms. Mai's deposition did not conform with the Indictable Procedure Act on taking of statements or depositions from witnesses.

67. Although Ms. Mai was deposed by the defendant on 31st December 2008, it is not clear from the record of the proceedings Ms. Violeta Chan, the clerk of the defendant Magistrate's Court helpfully put in evidence in her affidavit how Ms. Mai came before the defendant. I will not include the exchange between the attorney and the court. It is not part of the record. The defendant stated that he was on the record invoking section 41 of the Indictable Procedure Act. This section grants coercive power to a magistrate, by summons or warrant, to get a person to come forward and to make a written statement on behalf of the prosecution containing evidence, or to produce a document or other exhibit likely to be material evidence

for the purposes of a preliminary inquiry before an examining magistrate.

68. In my view, the best practice would be to utilize section 41 of the Act only to depose a would-be witness before a magistrate **qua** magistrate and not before the magistrate who is himself conducting the preliminary inquiry into the offence alleged against an accused. The Act makes and intends a distinction between a magistrate **simpliciter** and an "examining magistrate". The latter is defined as "the magistrate holding a preliminary inquiry into a crime."

69. I see therefore no reason why Ms. Mai could not have been deposed before **another** magistrate than the defendant, who deposed Ms. Mai on 31st December 2008 and proceeded himself to conduct the committal hearing involving the claimant on 29th January 2009. By then the defendant was already seised of Ms. Mai's deposition which the prosecutor was in the event, to put ritualistically, as it were, put before him as part of the evidence for the claimant's committal hearing. I find this procedure unsatisfactory. The deposition of Ms. Mai on 31st December 2008 by the defendant and the latter's conduct of the claimant's preliminary inquiry on 29th January 2009 at which that deposition was used would, it seems to me, have the effect of preconditioning the defendant and probably predisposing him to commit the claimant for trial. Ms. Mai's deposition is more like a narrative and no questions seemed to have been asked of her and note taken of her answers. She also simply signed off on the defendant's notebook at the end of her statement. I find this aspect of this case troubling and unsatisfactory, especially given the fact that the claimant was charged on 4th December 2008, and the preliminary inquiry held on 29th January 2009. Surely after charged, if the

prosecution is looking for any other evidence they could have produced Ms. Mai either in Belize City before another magistrate instead of waiting until the 31st December, after the claimant had been charged to depose Ms. Mai.

70. I hope in the future, such a state of affairs would be avoided. There are other magistrates before whom potential witnesses could be disposed other than the magistrate conducting the preliminary inquiry. I see no reason in fact why a section 36 statement was not obtained from Ms. Mai as was done in the case of Mr. Barrow and Ms. Wallace and if needs be if he is recalcitrant then recourse to section 41, but that is for the prosecution to decide.

71. On the whole however, after a careful perusal of the provisions of the Act relating to the admissibility of evidence by a magistrate's court inquiring into an offence, in particular sections 35, 36, 37 and 41 of the Act. I find that the charge that inadmissible evidence was used in the claimant's committal proceedings, that charge cannot be sustained.

72. I am satisfied that the statements of both Mr. Barrow and Ms. Wallace met the provisions of section 36 of the Act on written statements and the deposition of Ms. Mai, subject to the observations I have made, and the documents or exhibits referred to therein, complied with the provisions of section 37 on depositions.

73. I therefore now turn to an examination of the contention that the evidence put before the defendant failed to disclose any indictable offence, particularly the offence of theft charged against the claimant.

74. I have stated the evidence, all documentary, that was put before the defendant at para. 61 **supra**.

75. In the first place, as regards Mr. Barrow's and Ms. Wallace's statements, I am satisfied that a careful read through these statements **do not** disclose or lead to any reasonable conclusion that the claimant or Mr. Fonseca (who was with the claimant at the audience with the Prime Minister) committed the offence of theft. At the highest, these statements were only recounting what Mr. Barrow said the claimant and Mr. Fonseca said to him concerning the Venezuelan grant to Belize of US $20 million dollars; and how US $10 million of this sum was used to pay off the Government of Belize's guarantee of Universal Health Services (UHS) loan with the Belize Bank; and the other US $10 million dollars would be used for housing and the Marion Jones Sporting Complex: and how, according to the claimant's understanding, the Venezuelan authorities gave their blessing to this and that only US $10 million would be publicly declared. Mr. Barrow also stated that he queried this because the same Venezuelan authorities who had let the new Belize Government know of the full amount of the Venezuelan grant as to US $20 million dollars were asking for proof that it had been spent on housing.

Ms. Wallace's statement essentially confirmed the audience and stated, among other things, that the claimant told the Prime Minister (Mr. Barrow) what had taken place and that primarily, he, (the claimant), wanted the Prime Minister to know that the US $10 million dollars did not go into anyone's pocket and he explained that he (the claimant) had made a decision that the money would be used to pay off the UHS' debt with the Belize Bank which the Government had guaranteed.

Both Mr. Barrow and Ms. Wallace stated in their statements that the claimant said that he would make a radio/television statement on the issue to the nation.

76. It would, in my view, be reading far too much in these statements to find that they amounted to a confession or admission of the offence of theft by the claimant or Mr. Fonseca, as the learned Director of Public Prosecutions urged. It would, with respect, take an overwrought imagination to come to this conclusion.

77. The claimant did in fact make a public broadcast on the evening of the day of the audience with the Prime Minister (I have mentioned this at para. 14 of this judgment – more on it in the context of these proceedings later before me.

78. After a careful read through Mr. Barrow's and Ms. Wallace's statements I am satisfied that they could not lead to any reasonable opinion that they contained sufficient evidence to commit the claimant for trial for theft.

79. This is so because it is to be remembered that under section 34, the criterion for committal is that the examining magistrate is of the opinion **that there is sufficient evidence to put the accused on trial** for the offence … with which he is charged or for any other indictable offence which is disclosed on the evidence tendered in court. In law, this determination can only be made after a contested hearing resulting in a considered decision.

80. I am not satisfied that from either Mr. Barrow's or Ms. Wallace's statement that there could be said to be anything of the nature of

sufficient evidence to inform the defendant's opinion and warranted his decision to commit the claimant.

81. It is therefore difficult to understand how, in the circumstances, the claimant could be proceeded against for a charge of theft on this evidence.

82. I now turn to the deposition of Ms. Mai herself and its exhibits. During the hearing, this was referred to as the lynch-pin for the defendant's decision to commit the claimant. I have already at paras. 64 – 68 above, commented on the circumstances attendant on Ms. Mai's deposition and concluded at para. 70 that it and the documents referred to in it that were put in evidence before the defendant did not transgress sections 35 and 37 governing the admissibility of depositions for the purposes of a preliminary inquiry.

83. But, I find again that a careful read through the deposition itself and its accompanying documents discloses **no sufficient evidence** of the crime of theft by the claimant that would warrant his committal for trial on this charge.

84. The deposition itself is a narrative by Ms. Mai of her brief sojourn to Caracas, Venezuela in late December 2007, on the instructions of the claimant, who was the Prime Minister at the time. Her instructions she deposed, were to finalize a grant between Venezuela and Belize. She was at the time the CEO in the Ministry of Foreign Affairs. For this purpose she was provided with an Authority to Sign and a copy of a letter dated 23rd December 2007, written by the claimant on the letterhead of the office of the Prime Minister of Belize to Sr. Rafael Isea Romero, the Vice Minister of Finance of Venezuela about the Venezuelan grant. Both the

Authority to Sign and the claimant's letter were put as documents before the defendant as was the translated copy of the Agreement with Venezuela. I have at paras. 7 and 8 above of this judgment reproduced the material parts of the letter and the Authority to Sign.

85. In her deposition Ms. Mai related her experiences in Caracas when she went to execute the Agreement. I quote verbatim from her deposition which was put before the defendant:

> ***"When I went to the Bandes Bank with Director Calvo and the Ambassador, I met with other persons from the Bank, in particular Mr. Arias, the Vice President of the Bank, who provided me with copies of agreements to be signed. My understanding was that the grant was to have been a gift to Belize and I was surprised by the contents of the agreement. I sought clarification from Mr. Arias and he told me that he needed information on how the funding was to be spent and that he need to protect the interests of the Bank and further, that if we did not sign the agreement as it was, the monies would not be disbursed.***
>
> ***I called then Minister of Housing Ralph Fonseca and informed him of the contents of the documents and that I was being asked to sign them as is. He later called me back and***

instructed me to sign the agreement. In the course of negotiations I made several calls to then Minister Fonseca in relation to the matters raised in the agreement and received instructions from him. One of the issues that arose was in relation to the instructions to wire funds to the Belize Bank in London as Mr. Arias asked in what currency the money should be sent. I called then Minister Fonseca and he spoke directly to Mr. Arias and responded to his questions in that regard.

I eventually signed the agreement."

That was all Ms. Mai had to say in her deposition materially to the charge against the claimant.

86. I cannot find **any** evidence in Ms. Mai's deposition and its accompanying documents that is remotely suggestive of the offence of theft by the claimant.

87. The defendant was required to consider and satisfy himself that there was **sufficient evidence** to put the claimant on trial. The defendant was exercising a statutory power in committing the claimant for trial. That this exercise was dependent on the defendant's opinion, does not, I think, mean it must be done without regard to the sufficiency of evidence in the particular case.

88. To be sure, section 34 of the Act speaks of the **opinion** of the examining magistrate, but in my view, it must be an **informed opinion** based on the state of the evidence before him and the submissions for the prosecutor and the accused. The exercise, therefore, of the power to commit for trial under section 34 is subject to judicial review not only for inadmissible evidence but also on grounds of insufficiency of evidence. Although the court may be slow, it has to be a convincing case. This is so, in my view, for otherwise there would be no distinction between a section 33 committal, the paper committal and a section 34 committal. The latter is available only after the examining magistrate has ascertained that the accused wishes to make a submission on the sufficiency of the evidence, and only after hearing the submissions thereon by both the prosecution and the defence can the examining magistrate exercise his power to commit for trial. This is unlike a paper committal under section 33 where all the examining magistrate has to do is to satisfy himself that all the evidence for the prosecution is in the form of written statements, copies of which have been given to the accused at least fourteen days before the date of the inquiry, then the examining magistrate shall commit the accused for trial.

89. In the instant case, though I am not satisfied that there was inadmissible evidence before the defendant, I find that there was insufficiency of evidence before him to support his committal of the defendant on the charge of theft. The ingredients of the offence of theft, as the defendant himself correctly recognized are:

a) Dishonesty by the accused

b) Appropriation of

c) Property belonging to another

d) With the intention of permanently depriving the owner of it.

But I find that on a careful read through the documents put before the defendant, there cannot be said to be any rational basis for the committal of the claimant. As I say I am not in these proceedings the trial judge of the guilt or otherwise of the defendant. It is just to assure myself and the court that there was sufficient evidence.

90. Moreover, I had at para. 14 of this judgment mentioned the statement made by the claimant in a broadcast to the country on 5th March 2008 after his audience together with Mr. Fonseca with the Prime Minister. The making of his statement though referred to in Mr. Barrow's own statement was not produced in evidence before the defendant. As the law now stands, the claimant as an accused person at a preliminary inquiry cannot give evidence on his own behalf or call witnesses, and if the prosecution calls witnesses, they cannot be cross-examined by or on behalf of the accused. Mr. Flowers SC for the claimant stated that this was the reason why the statement of the claimant on the Venezuelan grant could not be put in evidence by him before the defendant.

91. He however sought leave to have the claimant file this as a part of his affidavit evidence before this court, and I must say in judicial review the court has power to admit evidence. This was granted.

92. This broadcast statement was however, for some inexplicable reason, not put in by the only party to the preliminary inquiry involving the claimant who, in law, could put in evidence whether

documentary or exhibits, before the defendant as an examining magistrate: and that authority or person is the prosecution, in this case, the learned acting Director of Public Prosecutions, but it is a prosecutorial decision which I don't query here. I only review this evidence for the purposes of this case.

93. I have had the benefit of reading the text of this broadcast statement by the claimant. I am convinced and satisfied that it does not evidence in the slightest any intent on his part to commit the offence of theft.

94. It is a matter of regret that it was not put before the defendant as the examining magistrate and I do not invite speculation. It was just not put. But I have no doubt that the requirements of fairness would dictate its production. Having had the advantage of reading it in cold print, it reinforces my conclusion that even with the documents put in at the preliminary inquiry, there was no evidence on which any reasonable decision-maker properly directing his mind to the issue at hand – whether the claimant stole US $10 million, the property of the Government of Belize, could have arrived at the conclusion to commit the claimant. In committing the claimant for trial on the alleged offence of theft, I find that there was no evidence before the defendant reasonably capable of supporting his decision. There was here, I find, simply no evidence upon which the defendant could have property exercised the statutory power he has to commit the claimant for trial on the charge of theft.

95. It is clear from the broadcast statement that when half of the Venezuelan grant was used to pay off the Government of Belize's obligation in respect of the UHS' loan guarantee the government had given to the Belize Bank, the claimant at the time was both the

Prime Minister and Minister of Finance at the material time. To be sure the assumption of the loan guarantee was and is still controversial. But acting in his public official capacity as Prime Minister and Minister of Finance to satisfy that guarantee is not in the circumstances a criminal act: certainly not the act of theft.

The claimant might have been guilty of political fecklessness in not making public at the time the full amount of the Venezuelan grant and the use of half of it to pay off the UHS' loan guarantee. But fecklessness in public office is not ordinarily, and I trust, a crime. And the payment to the Belize Bank of the US $10 million of the grant was clearly known to the Venezuelan authorities: they wired the money.

96. In my view, the claimant's crime, if a crime it is, was to have kept the people of Belize in the dark about the full amount of the Venezuelan grant and the use of half of it to meet what may be a controversial Government of Belize's loan guarantee to the Belize Bank. Regrettably, however, it is the wont of most governments often to keep their citizens in the dark.

The proven antidote to this is a vigilant, independent and free press, a comprehensive Freedom of Information Act and in a democracy like Belize, Parliamentary accountability with ultimate electoral sanction.

97. But I cannot find any evidence in the materials put before the defendant as the examining magistrate to warrant, justify or support his committal of the claimant for trial for the offence of theft.

98. In the result I conclude that there was not, from the materials before the defendant, anything reasonably capable of supporting his committal of the claimant. In this regard, I adopt with respect this statement by Lord Cooke of Thorndon in **Bedwelty supra** at p. 371:

> ***"... in my respectful opinion it would be both illogical and unsatisfactory to hold that the law of judicial review should distinguish in principle between a committal based solely on inadmissible evidence and a committal based solely on evidence not reasonably capable of supporting it. In each case there is in truth no evidence to support the committal and the committal is therefore open to quashing on judicial review."*** (Emphasis added).

99. Indeed, commenting on the outcome of **Bedwelty**, the learned authors of **Archbold**, **Criminal Pleading, Evidence and Practice** (2001 ed) at para. 1-212 stated as follows:

> ***"Their Lords also resolved an issue left open in Neil (supra) by holding that in a clear case, a committal for trial should also be quashed on the basis of insufficiency of evidence, even when further evidence to establish a prima facie case could be put before the Crown Court."***

iv) <u>Was the defendant's committal of the claimant unreasonable while discharging Mr. Fonseca later on the same charge and evidence</u>?

100. In the light of the findings and conclusions I have arrived at in the preceding sections, it is not surprising that, in the circumstances, the claimant complains that his committal by the defendant was unreasonable and perverse because on the same charge of theft and evidence laid and used in the preliminary investigation of Mr. Ralph Fonseca, before the defendant, he discharged Mr. Fonseca.

101. The claimant filed a second affidavit dated 5th March 2009 to ground this complaint. He avers in paras. 3 and 4 of this affidavit that shortly after he had been charged with theft of US $10 million dollars, Mr. Ralph Fonseca, former Minister of Housing and Home Affairs in the claimant's administration), was charged with the exact same offence. But on the 3rd day of March 2009, the defendant at the preliminary inquiry concerning Mr. Fonseca, without giving any reasons, found that there was insufficient evidence against him and discharged him. The claimant exhibited a copy of the Channel 7 Nightly News reporting on the defendant's decision relating to Mr. Fonseca's discharge.

102. The claimant therefore has urged on this Court that the defendant's decision to commit him for trial is perverse, irrational and unreasonable and so manifestly prejudicial that it should be quashed.

103. This contention urged on behalf of the complaint may not in the circumstances sound implausible. For the ordinary person in Queen Square Market, if told of what had happened, that the claimant on the same charge and evidence as Mr. Fonseca, was

committed for trial while Mr. Fonseca was let off, would scratch his head in puzzlement and wonder if the decision in relation to the claimant was reasonable. That reasonable person at the Queen Square Market may be forgiven if with a shrug of his shoulders, he says well, it is a case of "look to the man higher up" or "let the superior make answer". That is to say, "***respondeat superior*.**"

104. But this charge of **"*respondeat superior*"** is not part of our criminal law outside of the military. In our criminal justice system, responsibility or culpability is personal: a superior does not answer for a junior unlike in the field of tort where an employer or principal may be held liable for the employees or agents wrongful act, committed within the scope of employment or agency.

105. One is left to wonder why, on the charge and the evidence proffered in this case, the claimant and Mr. Fonseca were not charged together and one preliminary inquiry held at the same time? This however, is a matter wholly for the prosecution to decide. But, I cannot be unmindful of the savings in the court's time that would be achieved. But the different outcome of the preliminary inquiries on different days, has given cause to the claimant's complaint that his committal by the defendant, in the circumstance, was perverse, irrational and unreasonable and manifestly prejudicial to him. It is therefore, reasonable to conclude that in respect of the claimant, the defendant might have been influenced by considerations of ***respondeat superior***.

106. The principle of reasonableness actuates and guides courts, especially in the field of judicial review. As the learned authors of **Administrative Law** (the late Sr. William Wade and Christopher Forysyght, 9th Ed.) stated: at p. 353:

"This doctrine is now so often in the mouths of judges and counsel that it has acquired a nickname, taken from a case … the Wednesbury case. The reports now are freely sprinkled with expressions like the Wednesbury principles", "Wednesbury grounds." As Lord Sumner explained in the case of R v Secretary of State for the Environment ex parte Nottingham CC (1986) A.C. 240 at p. 249:

> **"Wednesbury principle is a convenient legal "shorthand" used by lawyers to refer to the classical review by Lord Greene MR in the Wednesbury case of the circumstances in which the courts will intervene to quash as being illegal the exercise of administrative discretion". (Emphasis added).**

107. It is part of the mete by which courts assess or determine the reasonableness or fairness of an administrative decision or action.

108. I therefore apprehend that the **Wednesbury** principle is more readily and easily applicable in the general field of administration in contradistinction to the judicial field, such as a determination by a court of law, whether inferior or superior. The more usual and convenient remedy in the case of the latter is through the appellate process. This is not to say that judicial review cannot lie against a

Magistrate's Court determination. The present proceedings do prove that judicial review can, in appropriate cases, be available, but it is rare and exceptional. Therefore the **Wednesbury** ground to challenge a Magistrate's Court decision is even rarer and more exceptional.

109. To her credit, the learned Director of Public Prosecutions conceded, though somewhat grudgingly, during the hearing that it was unreasonable for the defendant to have committed the claimant and then discharged Mr. Fonseca on the same charge and on the same evidence. She however, urged that the claimant's committal should be left undisturbed as the defendant was entitled to commit him.

110. Given my findings and conclusions on the other issues in this case, I would rather leave the issue of the unreasonableness or otherwise of the defendant's decision in relation to his committal of the claimant and the discharge of Mr. Fonseca open. I do not feel it necessary to come to a conclusion on it in these proceedings in the light of my finding on the issues. I would rather that the **Wednesbury** principle of unreasonableness be left in the sphere of administrative law, where I think it properly belongs.

111. I am fortified in this position by the fact that in the light of my findings and conclusions on the other issues in this case, in particular on jurisdiction and insufficiency or lack of evidence, the claimant has successfully made out a case for relief against his committal for trial by the defendant.

Conclusion

112. I have however, borne in mind the hesitation Lord Mustil expressed in **Neil supra** at p. 859 against the use of the power of the Court to intervene if the only ground raised in a challenge to a committal order was insufficiency of evidence rather than misreception of evidence, and that he would not, on the facts of that case have thought it proper to do so. But he has stated at p. 858:

> **"For the moment,** ***am unwilling to go further than to doubt whether in a case where it is quite obvious that the committal materials disclose no offence, the court is powerless to protect the defendant from the stress, labour, expense not to speak of the possible loss of liberty) entailed in having to wait until the end of the prosecution's case at the trial before the obvious conclusion is drawn"*** (Emphasis added).

The hesitation expressed by Lord Mustil in being ready to quash a committal order based on misreception of evidence but not so on insufficiency of evidence was later explained by Lord Cooke of Thorndon in **Bedwelty supra** at p. 371, I have already mentioned at para. 98 above of this judgment: a committal based solely on inadmissible evidence is as susceptible to quashing as an order of committal based solely on evidence not reasonable capable of supporting it. In each case, as his Lordship stated, there is in truth, no evidence to support the committal and the committal is therefore open to quashing on judicial review. In my view, therefore there may seem to be no distinction between a misreception of evidence

that may lead to a quashing of a committal order and the finding that there was no evidence to support the committal.

113. In this case, I have found on the defendant's own express finding that the offence was committed abroad. There was therefore no jurisdiction in him to have committed the claimant for trial.

Moreover, after a careful review of all the materials placed before the defendant, I find that there was no evidence reasonably capable of supporting his committal of the claimant.

114. In the result, this court, to paraphrase Lord Mustil, in **Neil**, is not powerless to protect the claimant from the stress, labour and expense, not to talk of the possible loss of liberty entailed in having to wait until the end of the prosecution's case at the trial before the obvious is made plain.

115. I accordingly, order that the defendant's committal of the claimant to stand trial for the offence of theft be quashed, and it is hereby declared that it is to be quashed. I order and direct pursuant to Order 56 rule 14(2)(a) that the proceedings founded on that committal order be brought up to this Court to be quashed.

116. Let me before I conclude say this, what I said at the trial at the beginning of the hearing for permission and I quote it again for the interest of the public:

> **"As a court of law it is important always to be immunized against any influence of opprobrium or antipathy that a particular accused or defendant might have engendered in the public**

mind or eye. It is the unalterable, in my view, unshakeable duty of the court to consider only the admissible evidence presented to it in open court and decide according to the relevant law."

That is the view of this court.

A. O. CONTEH
Chief Justice

DATED: 8th June 2009.